BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NANCY MCMURRAY	)	
Claimant	)	
VS.	)	
	)	Docket No. 247,669
WESTERN RESOURCES, INC.	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant appeals the January 22, 2002 Award entered by Administrative Law Judge Bryce D. Benedict.

Claimant suffered accidental injury to her right leg on September 14, 1998. The parties stipulated that claimant's accidental injury arose out of and in the course of her employment. Pursuant to Western Resources' policies and procedures manual, claimant was paid full wages from the date of injury to the date she was released by her physician to return to work. The Administrative Law Judge found, under K.S.A. 44-510f(b), that the payment by respondent was voluntary and any excess amounts were allowed as a credit to the employer from the final award.

Claimant contends the payments were made pursuant to an employer/employee contract and were, therefore, not voluntary and the credit provisions should not apply. The Appeals Board (Board) held oral argument on August 6, 2002.

APPEARANCES

Claimant appeared by her attorney, John J. Bryan of Topeka, Kansas. Respondent appeared by its attorney, Jeffrey W. Jones of Topeka, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award.

ISSUES

Is respondent entitled to a credit pursuant to K.S.A. 44-510f(b) (Furse 1993)?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Board finds that the Award of the Administrative Law Judge should be reversed and respondent should be denied the credit pursuant to K.S.A. 44-510f(b) (Furse 1993).

Claimant suffered accidental injury to her right lower leg on September 14, 1998. The parties have stipulated to all the elements required in this matter with the only issue remaining being the entitlement, or lack thereof, to a credit pursuant to K.S.A. 44-510f(b) (Furse 1993). Claimant was paid full wages for 4.57 weeks after her injury up to the time she was returned to employment by the treating physician. This resulted in a payment to claimant of $2,952.40 before deducting Social Security and income tax. A Stipulation signed by claimant's and respondent's attorneys and filed with the Kansas State Workers Compensation Division in Topeka, Kansas, on November 13, 2001, has attached to it a portion of respondent's human resources policies and procedures manual. The manual contains a section titled "Time Ticket Coding", which includes Time Code 71. Time Code 71 states as follows:

> (a) Time Code 71 - Industrial Injury Code is for the payment of wages as provided by Company policy or Union Contract, which are in addition to statutory payments (**temporary total**) required by Worker's Compensation to provide the injured employee his/her regular wages while on lost time. Earnings from time code 71 are subject to normal payroll withholdings.
>
> Time code 71 is applicable as follows:
>
> (1) Exempt and non-union hourly employees receive full wages following the date of injury to the date released by the physician to return to work. Time code 71 is used to pay the amount in addition to any state statutory payments (**temporary total**).

K.S.A. 44-510f(b) (Furse 1993) states:

> If an employer shall voluntarily pay unearned wages to an employee in addition to and in excess of any amount of disability benefits to which the employee is entitled under the workers compensation act, the excess amount paid shall be allowed as a credit to the employer in any final lump-sum settlement, or may be withheld from the employee's wages in weekly amounts the same as the weekly amount or amounts paid in excess of compensation due, but not until and unless the employee's average gross weekly wage for the calendar year exceeds 125% of

> the state's average weekly wage, determined as provided in K.S.A. 44-511 and amendments thereto. The provisions of this subsection shall not apply to any employer who pays any such unearned wages to an employee pursuant to an agreement between the employer and employee or labor organization to which the employee belongs.

The dispute in this matter hinges upon whether the payments made to claimant were voluntary or were made pursuant to an agreement between the employer and the employee. Attached to the parties' stipulation was the "Foreward" *[sic]* to respondent's policy manual, which is as follows:

> These policies and procedures are applicable to Western Resources employees. The policies and procedures contained in this manual are guidelines only. They may be supplemented, modified, superseded, or withdrawn, with or without notice, and without the consent of any employee, retiree, or participant, at any time at the Company's sole discretion. While they are designed to encourage uniformity in the treatment of similar situation, the Company, at its discretion, may or may not choose to follow a policy in a particular case.
>
> These policies and procedures are not to be construed as constituting a contract of employment, expressed or implied, and they are not to be deemed to have created any enforceable rights on behalf of any employees.
>
> Each policy and procedure contained in this manual supersedes all prior communications on the subjects covered by the policy.

K.S.A. 44-510f(b) (Furse 1993) makes it clear that a respondent is not entitled to a credit against an award for payments made under a legal obligation independent of the Workers Compensation Act.[1] The Kansas Court of Appeals rationalized that payments made pursuant to the terms of a written contract are not voluntary payments. K.S.A. 44-510f(b) (Furse 1993) negates the employer's right to a credit for payments made pursuant to a contract. Respondent argues the disclaimer contained in the Foreward *[sic]* controls the terms of the agreement between the parties. However, the Kansas courts have held that a disclaimer does not necessarily preclude the formation of an implied contract of employment. The Kansas Court of Appeals has also said that a disclaimer in a supervisor's manual does not, as a matter of law, decide the issue of an implied employment contract.[2]

The parties, instead, look to the intention of the parties and attempt to divine from the totality of the circumstances the existence of an implied contract of employment. An

---

[1] *Knelson v. Meadowlanders, Inc.*, 11 Kan. App. 2d 696, 732 P.2d 808 (1987).

[2] *Morriss v. Coleman Co.*, 241 Kan. 501, 738 P.2d 841 (1987).

implied contract of employment arises from the facts and circumstances showing a mutual intent to contract.[3]

The Kansas Court of Appeals, in *Allegri*,[4] lists the relevant factors to be considered in deciding whether the parties had mutual intent to contract. Those factors include:

(1) Written or oral negotiations;

(2) The conduct of the parties from the commencement of the employment relationship;

(3) The usages of the business;

(4) The situation and objective of the parties giving rise to the relationship;

(5) The nature of the employment; and

(6) Any other circumstances surrounding the employment relationship which would tend to explain or make clear the intention of the parties at the time the employment commenced.

In the Stipulation filed with the court, the parties acknowledge that respondent has consistently followed the policy, as set forth in the policy manual, since it was originally made effective April 1, 1989.

Respondent, in its brief to the Board, cites from the Collective Bargaining Agreement, section 10.5, titled "Supplemental Occupational Injury Pay." However, this particular section of the Collective Bargaining Agreement was not placed into record before the Administrative Law Judge. In addition, the Stipulation of the parties states:

> 17. This stipulation is intended by the parties to constitute the entire evidentiary record in this case for decision. The parties both waive providing additional evidence and request the Administrative Law Judge make an award of 7½% permanent partial disability to the right lower leg and make appropriate findings and conclusions as to whether respondent is entitled to a credit for the amounts paid under time code 71.

---

[3] *Kastner v. Blue Cross & Blue Shield of Kansas, Inc.*, 21 Kan. App. 2d 16, 894 P.2d 909, *rev. denied* 257 Kan. 1092 (1995).

[4] *Allegri v. Providence-St. Margaret Health Center*, 9 Kan. App. 2d 659, Syl. 5, 684 P.2d 1031 (1984).

Respondent not only did not place the additional collective bargaining agreement information in the record, it entered into a stipulation verifying that the stipulation with its attachments constituted the entire record.

K.S.A. 1998 Supp. 44-555c(a) states:

> The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

Review by the Workers Compensation Board is de novo on the record. However, the Board is limited in that it can only consider the information provided to the administrative law judge.[5] The parties, absent a stipulation, are not entitled to supplement the record before the Board. In this instance, any additional information from the Collective Bargaining Agreement proffered by respondent cannot be considered by the Board as it was not presented to the Administrative Law Judge at the time of the initial determination of this matter.

In this circumstance, the Board finds that claimant has provided evidence that a contract existed between claimant and respondent which obligated respondent to pay claimant her regular wages while on lost time under Time Code 71. Under K.S.A. 44-510f(b) (Furse 1993), respondent would have the burden to prove entitlement to a credit. Here, respondent would not be entitled to a credit, as the payments made were pursuant to an agreement between respondent and claimant. Thus, the payments were not voluntary. While there may be information available showing that a portion of the agreement required any payments made in excess of the statutory weekly benefits would be a credit, that information is not before the Board and cannot be considered.

The Board finds pursuant to the policy set forth in *Allegri*, *supra*, that the employment practices and procedures manual, specifically Time Code 71, creates a contractual obligation on respondent's part. The Board further finds it significant that pursuant to the stipulation of the parties, respondent acknowledges it has always followed the policy set forth since its original April 1, 1989 effective date. The Board, therefore, finds that the payments made by respondent were pursuant to an agreement between respondent and claimant, and the credit provisions of K.S.A. 44-510f(b) (Furse 1993) do not apply.

This finding renders moot claimant's argument regarding whether respondent was entitled to a credit for all the monies paid or whether claimant was entitled to a deduction for the monies withdrawn as Social Security and income tax.

---

[5] K.S.A. 1998 Supp. 44-555c.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the January 22, 2002 Award of Administrative Law Judge Bryce D. Benedict granting respondent a credit in the amount of $2,952.40 against the award of permanent partial disability benefits should be, and is hereby, reversed.

Claimant is entitled to 4.57 weeks temporary total disability compensation at the rate of $366 per week in the amount of $1,672.62, followed by 13.90724 weeks permanent partial general disability at the rate of $366 per week in the amount of $5,090.05 for a 7.5 percent permanent partial scheduled injury to the right lower leg, for a total award of $6,762.67.

As of the date of this Award, the entire amount would be due and owing to claimant without consideration for the claimed credit of $2,952.40.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of October 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Jeffrey W. Jones, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Director, Division of Workers Compensation